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IN THE

Supreme Court of the United States

OCTOBER TERM, 1959

UNITED STEELWORKERS OF AMERICA,
Petitioner,

v.

WARRIOR & GULF NAVIGATION COMPANY,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

ARTHUR J. GOLDBERG
DAVID E. FELLER
JERRY D. ANKER
1001 Connecticut Avenue, N. W.
Washington 6, D. C.

COOPER, MITCH, BLACK & CRAWFORD
1329 Brown-Marx Building
Birmingham, Alabama

Attorneys for Petitioner

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Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit, entered in the above entitled case on July 30, 1959.

OPINIONS BELOW

The Findings of Fact and Conclusions of Law of the District Court are reported at 168 F. Supp. 702. The opinion of the Court of Appeals is not yet reported. Both are reproduced in the Appendices to this petition.

JURISDICTION

The judgment of the Court of Appeals was entered on July 30, 1959. This Court has jurisdiction to review the judgment herein by writ of certiorari under 28 U. S. C. § 1254 (1).

QUESTIONS PRESENTED

In an action under Section 301(a) of the Labor Management Relations Act to compel arbitration pursuant to a collective bargaining agreement which provides for the arbi-

tration of "differences . . . as to the meaning and application of the provisions of this Agreement, or . . . any local trouble of any kind":

1. Is it proper for the court either:
   (a) to determine whether the union's contention in support of the grievance which it seeks to arbitrate is substantial or not, and to refuse to order arbitration when, in its view, the grievance is "insubstantial," or
   (b) To construe the substantive provisions of the collective bargaining agreement and to determine, as a condition precedent to ordering arbitration, whether the management action complained of violates any provisions of the agreement?
2. Does a provision stating that "Issues which conflict with any Federal statute in its application as established by court procedure or matters which are strictly a function of management shall not be subject to arbitration" require a court to determine, as a condition to ordering arbitration of a grievance based on provisions of the agreement other than the management clause, whether the company, in performing its management functions, has violated those other provisions?
3. If a court may make the determinations set forth above, were the courts below correct in determining from the evidence in the present case that under the agreement no grievance protesting the contracting out of work covered by the collective agreements could possibly be arbitrable?

STATUTE INVOLVED

Section 301(a) of the Labor-Management Relations Act, 1947, 61 Stat. 156, 29 U. S. C. § 185, provides as follows:

> Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this act, or

between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

STATEMENT OF THE CASE

Respondent Warrior & Gulf Navigation Company (hereinafter called "Warrior & Gulf" or "Company") is a subsidiary of the United States Steel Corporation engaged in the transportation by barge of steel products and raw materials used in the manufacture of steel (R. 91). It maintains a terminal at Chicasaw, Alabama, at which it performs certain repair and maintenance work on its barges. The maintenance employees and barge men employed at the terminal constitute a collective bargaining unit and are covered by an agreement between Warrior & Gulf and Petitioner, United Steelworkers of America, AFL-CIO, a labor organization, (hereinafter called "Steelworkers Union" or "Union"). This agreement (R. 7-29) specifies the wages, hours and working conditions of the employees at the terminal and contains both an absolute prohibition against strikes and lockouts (R. 8) and, in Section 10, a procedure for the settlement of disputes during the term of the agreement (R. 21).

Section 10 provides, in pertinent part, as follows:

"ADJUSTMENT OF GRIEVANCES

"Issues which conflict with any Federal statute in its application as established by Court procedure or matters which are strictly a function of management shall not be subject to arbitration under this section.

"Should differences arise between the Company and the Union or its members employed by the Company as to the meaning and application of the provisions of this Agreement, or should any local trouble of any kind arise, there shall be no suspension of work on account

of such differences, but an earnest effort shall be made to settle such differences immediately in the following manner:

"A. For Maintenance Employees:

"First, between the aggrieved employees, and the Foreman involved;

* * * *

"Fifth, if agreement has not been reached the matter shall be referred to an impartial umpire for decision. The parties shall meet to decide on an umpire acceptable to both. If no agreement on selection of an umpire is reached, the parties shall jointly petition the United States Conciliation Service for suggestion of a list of umpires from which selection will be made. The decision of the umpire shall be final. The expense and salary incident to the services of the umpire shall be paid jointly by the Company and the Union."

In August, 1958, the Union filed a grievance under this procedure, alleging that Warrior & Gulf had violated the collective bargaining agreement by its course of action in laying off employees in the bargaining unit while contracting their work out to other employers. (R. 152-53).

As shown at the trial of this case, the grievance was based on the claim that, between March of 1956 and December of 1958, Warrior & Gulf had almost halved the bargaining unit from 42 men to 23 men by greatly increasing the amount of maintenance work (which these employees could perform and had performed in the past) contracted to other companies.[1] These contracting companies used Warrior &

[1] Between March and November of 1956, Warrior & Gulf laid off 5 Mechanics and 5 Helpers (R. 92); between November of 1956 and January of 1957, Warrior & Gulf laid off 4 more Mechanics and 4 more Helpers making a total of 9 Mechanics and 9 Helpers laid off to Januar of 1957 (R. 93); between January of 1957, and the October date of trial, 3 more Mechanics quit and 2 retired, and no one was recalled (R. 93), which left a total of 23 employees remaining or a total payroll shrinkage of 14 Mechanics and 5 Helpers or 19 less

Gulf supervisors to lay out the Warrior & Gulf work (R. 56, 57; 65, 66); hired some of the laid-off Warrior & Gulf employees for less than the rate called for in the Warrior & Gulf contract with the Steelworkers Union (R. 58); and, indeed, assigned some of the laid-off Warrior & Gulf employees to the Warrior & Gulf work in their yards. (R. 56; 65). It was the theory of the Union that this action constituted a partial lockout (R. 153) and a violation of the seniority provisions of the agreement (R. 3, 73-74), as well as a violation of the provision specifying the wages to be paid for this work (R. 82).[2]

The grievance was processed through the preliminary steps of the grievance procedure without resolution. The Union then requested that the grievance be submitted to arbitration, as provided for in the agreement. Warrior & Gulf refused (R. 2-3, 53). The Union then filed this suit under Section 301 of the Labor Management Relations Act,

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bargaining unit employees from March of 1956 to the date of the trial. (R. 93, 94)

Meanwhile, during the time the repair force was being reduced, the contracting out of maintenance work almost doubled. In 1955, the Company contracted out $33,940.00 of repair work (R. 103); in 1958, the Company had contracted out $48,000.00 of repair work through September, which on a projected basis to the end of 1958, would be $64,000.00, or almost double the 1955 figure. (R. 128)

Warrior & Gulf supervisors continued to lay out the Warrior & Gulf work done by the subcontractors. There was no reduction in the number of supervisory or clerical employees (R. 69, 70) during the period when the bargaining unit was being reduced and additional work was being contracted out.

[2] The grievance itself (R. 152-153) did not specify the precise contractual theory relied on in support of the claim of contract violation. Grievances, being drawn by workingmen and not by lawyers, very often fail to do so. Indeed, one of the purposes of a grievance procedure providing for discussions at ascending levels of union and company responsibility is to explore and refine the issues before a case is taken to arbitration. To treat the grievance filed by the employees in the first step as defining the contractual issues sought to be arbitrated, as all members of the Court of Appeals did here, is plainly erroneous.

1947, 29 U.S.C. §185, to compel the Company to comply with its agreement to arbitrate the grievance (R. 1-5).

The Union filed a motion for preliminary injunction (R. 30), and the defendant filed a motion to dismiss for failure to state a claim (R. 35) and an answer (R. 44). When the motion for preliminary injunction came on for hearing all parties agreed to dispose of the entire matter at that hearing (R. 49).

The District Court overruled the Union's motion to strike the defenses, stated in the Company's answer, which went to the merits of the grievance, rather than its arbitrability (R. 51-52). After hearing the evidence, substantially all of which in fact went to the merits of the grievance, the district court made findings of fact and conclusions of law; granted Warrior & Gulf's motion to dismiss the complaint; and denied the Steelworkers' Union's motion for a preliminary and permanent injunction (R. 149-157). The district court found as a fact that the Union had not shown that the Company "engaged in any conduct which has violated any of the provisions of the present labor contract." (Finding of Fact 13, R. 155). It concluded as a matter of law, in substance, that the Union's grievance was not well founded. This conclusion was expressed in the following language (R. 156, App. A, p. 6-7).

> "4. The labor contract does not prohibit, and is not susceptible of being interpreted to require that defendant is prohibited from contracting out work.
>
> "5. The labor contract does not give the plaintiff or any of its members or any of the employees of the defendant the right to have arbitrated the question of whether the defendant may contract out work.
>
> "6. The right to contract out work is an inherent, traditional right of management which may not be questioned or subjected to arbitration in the absence of agreement on the part of the defendant or an express limitation thereof set forth in the labor contract.

"7. The Court has considered the specific contention that Section 10 requires arbitration 'should any local trouble of any kind arise,' and finds from examination of the remainder of Section 10, of Section 11, of the contract as a whole, the evidence and the arguments of the parties, that this language cannot be interpreted to limit the right of the defendant to contract out work."

The Court of Appeals for the Fifth Circuit affirmed, Judge Rives dissenting. The majority first noted that the agreement withdrew from the section dealing with grievances any matters "which are strictly a function of management." Interpreting the agreement before it, the majority then concluded that the grievance concerned a subject which was strictly a "matter of management" because the agreement did not limit the power of the employer to contract with others to perform services previously done by its employees. (App. B, p. 3-4.)

This conclusion, the court said, rested on two grounds. First, all subjects not specifically covered by the collective agreement remain matters of management. (App. B, p. 3-4.) Second, the Union in this case actually had sought to negotiate in 1956 a clause dealing with subcontracting. Under those circumstances it would be inconsistent "with basic principles governing the construction of a contract" for a court to construe it to give the Union the provision it unsuccessfully sought to have incorporated. (App. B, p. 4-5.)

The statements in the grievance that the Company's actions were "discriminatory" and constituted a "partial lockout" were not sufficient to bring the grievance into the "range of arbitration," the court said, since the actions complained of, by whatever name called, were exempted from arbitration. Any contention that they constituted a violation of the contractual provision against discrimination against members of the Union or of the provision prohibiting lockouts was "insubstantial." (App. B, p. 5-6.)

Judge Rives, dissenting, limited himself to the "partial lockout" and "discrimination" contentions set forth in the grievance, although he noted that the grievance need not meet the precise requirements of strict pleadings. (App. B, p. 6.) The agreement, he said, contained provisions flatly prohibiting lock-outs and discrimination against union members. If, as charged, the Company's actions did constitute a partial lockout or were discriminatory, then they violated the agreement. The determination of that question, he concluded, was for the arbitrator. (App. B, p. 8.)

The argument that subcontracting was "strictly a function of management" and that, therefore, no dispute involving subcontracting could be arbitrable he found not to withstand analysis. First, he said, the management clause in the contract did not sustain it. That clause specified management rights but did not expressly reserve the unlimited right to subcontract. (App. B, p. 9.) Nor did the district court's finding that the Company had in fact subcontracted work without Union protest in the past fill the gap. For the question to be arbitrated here was not whether management's rights included the right to subcontract work, but whether under the circumstances of this case it abused that right by exercising it in a way which violated other provisions of the agreement, and that question was not "strictly" one of management's rights. (App. B, p. 9-11.) Second, he said, the failure of the Union to obtain the clause forbidding *all* subcontracting which it proposed in 1956 did not prove that the contract could not be construed in a more limited way, as prohibiting subcontracting which violated other provisions of the agreement. (App. B, p. 9-11.)

Finally, he concluded, the findings of the district court that no violation of the contract occurred went to the merits of the grievance, not its arbitrability. It was unnecessary, in his view, to decide whether the Fifth Circuit should adopt

the *Cutler-Hammer*[3] doctrine as the Sixth Circuit did in the *American Manufacturing* case[4] or reject it as the First Circuit did in the *New Bedford Products Division*[5] case, since the grievance in this case was not so lacking in substance as to fall within the ambit of the *Cutler-Hammer* doctrine. (App. B, p. 8, n. 8.)

REASONS FOR GRANTING THE WRIT

1. This case presents, in a somewhat different context, essentially the same problem that is presented in *United Steelworkers* v. *American Manufacturing Co.*, 264 F. 2d 624 (6th Cir. 1959) (petition for certiorari filed in this Court August 28, 1959, No. 360). In that case, the Sixth Circuit refused to order arbitration of a grievance which concededly did involve a dispute as to the application of a particular section of a collective bargaining agreement because, in the court's view, the evidence clearly showed that the Union's claim was "baseless" on the facts. In the present case, the Fifth Circuit—Judge Rives dissenting—refused to order arbitration because, in its view, there was no language in the collective bargaining agreement which could be construed as forbidding the management action which the Union's grievance challenged. In both cases, the essential question is the same: to what extent, if any, should a federal court, when asked to compel arbitration of a union's claim that an employer has violated a collective bargaining agreement, enter into an examination of the merits of that claim before directing that it be settled in the forum which the parties have specifically chosen to settle such claims.

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[3] *International Ass'n of Machinists* v. *Cutler-Hammer, Inc.*, 67 N. Y. S. 2d 317, 271 App. Div. 917 (1st Dept.), *aff'd*, 297 N. Y. 519, 74 N. E. 2d 464 (1947).

[4] *United Steelworkers of America* v. *American Manufacturing Co.*, 264 F. 2d 624, now pending on petition for certiorari in this Court, No. 360, October Term, 1959.

[5] *New Bedford Defense Products Division* v. *Local 1113, UAW*, 258 F. 2d 522, 526-27.

We have set forth in detail in the petition for certiorari filed in the *American Manufacturing* case (No. 360), copies of which will be served on the respondent herein, the reasons why we believe that this issue should be resolved by this Court. For the same reasons there set forth we urge that certiorari be granted also in this case.

2. Since the filing of the petition in No. 360, the United States Court of Appeals for the Tenth Circuit has rendered a decision directly contrary to the present decision of the Fifth Circuit, in a case which is indistinguishable from the present case in its essential facts. *Local 1912, IAM* v. *United States Potash Co.*, 44 LRRM 2861 (10th Cir., Sept. 8, 1959). That case also involved a suit under Section 301 to compel arbitration of a grievance which claimed that the employer had violated the applicable collective bargaining agreement by subcontracting certain work formerly performed by employees covered by that agreement. The agreement contained no language expressly prohibiting subcontracting, and the union's position in that case, as in this case, was that the agreement limited by implication management's right to contract out the work of the bargaining unit. In language similar to that of the collective bargaining agreement at issue here, the agreement in the *United States Potash* case provided that "all matters related to this Company and its operations and employment with or by this Company . . . are exclusively within the jurisdiction of the Company and *not subject to Union action or consent or to arbitration,* except such . . . conditions of employment as are specifically provided in the terms of this agreement . . . ". (Emphasis added.) It also provided that "only a question or questions as to the proper interpretation or application of this argument may be submitted to arbitration."

The Tenth Circuit held, in direct conflict with the holding of the Fifth Circuit in the present case, that the grievance was arbitrable and that the lower court had erred in refus-

ing to compel arbitration. The court refused to consider the merits of the grievance itself, pointing out that the court's function was simply "to determine whether the grievance dispute can be fairly said to present a question as to the interpretation or application of the contract. If so, the judicial function is at an end and the proper interpretation of the contract is for the arbitrator." Citing *New Bedford Defense Prod. Div.* v. *Local 1113, UAW*, 258 F. 2d 522 (1st Cir. 1958), the court stated that "grievances do not lose their arbitrability because we think they can be correctly decided only one way."

The court held that the absence of specific reference to subcontracting in the agreement

> "does not necessarily mean that subcontracting is excluded from the scope of the bargaining agreement. The contract is not couched in terms of specified grievances which are to be arbitrated, thereby excluding all others by implication. Nor does it specify the grievances which are not to be arbitrated, thereby including all others. See *Lodge No. 12, etc.* v. *Cameron Iron Works*, 257 F. 2d 467; Annot. 24 ALR 2d 752. Instead, it leaves room for interpretative implications of coverage, to be derived from an implied covenant of good faith and fair dealings which are the very lifeblood of collective bargaining agreements." 44 LRRM at 2863.

Noting that arbitrators had often found implied restrictions on subcontracting, and that courts sometimes had found none, the Tenth Circuit pointed out that "it is not for us to resolve the contrariety or to choose between the courts and the arbitrators. It is enough that the contrariety raises a question as to the proper interpretation or application of the contract—a function which belongs to the arbitrator." 44 LRRM at 2863.

3. The nature of the grievance in the present case raises

an additional and perhaps even more important problem which is not present in No. 360, the *American Manufacturing* case. In *American Manufacturing* the Sixth Circuit recognized that the particular grievance there involved was governed by the seniority section of the collective bargaining agreement, but the court refused to compel arbitration on the ground that in its view the company's action had been so clearly consistent with the agreement that the union's grievance was "baseless." In the present case, on the other hand, the majority of the Fifth Circuit refused to order arbitration on the ground that in their view the subject matter of the grievance which the Union sought to arbitrate was not covered by the collective bargaining agreement at all.

As we pointed out in the petition in *American Manufacturing*, there is a conflict between the decision of the Sixth Circuit in that case and the First Circuit in *New Bedford Defense Prod. Div.* v. *Local 1113, UAW*, 258 F. 2d 522 (1958), as to whether a court should evaluate the merits of a grievance before ordering arbitration once it is plain that the proper disposition of the grievance is governed by the agreement. The Sixth Circuit held that in such a case a grievance is not arbitrable if the court finds that the grievance is "baseless" on the facts. The First Circuit took the opposite position that "the Court in a §301 proceeding has no business to concern itself with a preliminary question whether the answer to the grievance on its merits may or may not be entirely clear under the language of the agreement." 258 F. 2d at 526.

It seems clear, therefore, that the First Circuit would have decided the *American Manufacturing* case contrary to the way the Sixth Circuit did. It is not nearly so clear, however, that the First Circuit would have decided *Warrior & Gulf* differently than the Fifth Circuit did.

Each time the First Circuit has been asked to compel arbitration in a case which, like *Warrior & Gulf*, involves a question as to whether the substantive provisions of the

agreement govern the particular grievance at all, that court, like the Fifth Circuit in the present case, has held that that is a question for the court. See *Local 149, American Fed. of Technical Engineers* v. *General Elec. Co.*, 250 F. 2d 922 (1st Cir. 1957), *cert. denied*, 356 U. S. 938 (1958); *Local 201, IUE* v. *General Elec. Co.*, 262 F. 2d 265 (1st Cir. 1959). The reasoning of the First Circuit seems to start from the premise that the court cannot compel arbitration until it has determined that the employer has an obligation to arbitrate. In a particular case, this means the union must show that the employer has an obligation to arbitrate the particular grievance. This is not shown, the First Circuit reasons, merely by pointing to the fact that the employer has agreed to arbitrate every question of "interpretation or application" of the agreement. The court must find that a particular substantive clause of the agreement applies to the particular grievance. A claim that the clause applies is not enough. The court must interpret the clause and find it applicable to the particular grievance or there is no question of application for the arbitrator.

For example, in the *Local 201* case, *supra*, the court stated:

> "Since under the particular agreement the court must preliminarily determine whether respondent has promised to submit Graciale's grievance to arbitration as involving 'the interpretation or application of a provision of this Agreement,' it is not enough that appellant local may *claim* that the Graciale grievance necessitates the interpretation or application of the seniority provisions of Art. IX. The court must be satisfied that this claim is well founded, that is, that the arbitrator can use those provisions as a controlling statute to decide the merits of the grievance." 262 F. 2d at 271 (emphasis in original).

The First Circuit thus seems to hold, in apparent agree-

ment with the Fifth Circuit, that the question whether a particular clause in the agreement, or any clause in the agreement, applies to a particular grievance is a question of interpretation for the court—not preliminarily, as under the *Cutler-Hammer* doctrine, but exclusively. Once the Court concludes that the grievance is governed by a substantive provision of the agreement, however, the First Circuit, unlike the Sixth Circuit, will compel arbitration without making a *Cutler-Hammer* kind of examination to determine whether there is arguable merit in the particular grievance on its facts.

It is clear that reasonable men can differ as to whether a particular grievance is or is not covered by a collective bargaining agreement. In *Local 149, supra,* the First Circuit held that an agreement which merely set forth job classifications and rates of pay could not resolve a dispute as to whether certain jobs had been placed in the wrong classification. This decision was strongly criticized by at least one highly respected labor relations expert and arbitration. See Cox, *Reflections Upon Labor Arbitration,* 72 Harv. L. Rev. 1482, 1512-13 (1959). Similarly, the Tenth Circuit, relying in part on the reported awards of several labor arbitrators, has disagreed with the Fifth Circuit's view that in the absence of specific language to the contrary a collective bargaining agreement cannot be construed to limit management's right to subcontract the work of the bargaining unit.

The plain fact is, of course, that when a court holds that the provisions of an agreement do not restrict management's right to subcontract (as in this case) or to assign employees to different shifts (as in the *Local 201* case, *supra*) or to put particular jobs in particular job classifications (as in the *Local 149* case, *supra*) it resolves the very dispute over the interpretation and application of the agreement which is at the heart of the grievance. The court thus usurps the function of interpreting the agreement which the parties have agreed shall be performed by an arbitrator.

Every collective bargaining agreement covers, either expressly or by implication, all matters relating to the employment relationship. If a particular provision of the agreement is applicable to a grievance then that provision limits management's rights. If no provision is applicable then, under the management's rights clause, or the implied reservation of management's rights which exists even if there is no such clause, the agreement provides that management's rights in that respect are not limited. It is therefore erroneous to reason, as the First Circuit does, that the court must determine whether the subject matter of a particular grievance is covered by the agreement or not covered by the agreement. The question, rather, is whether the grievance involves a matter on which management's rights are restricted by the agreement or a matter on which, under the agreement, management is to be free of restriction. The resolution of that question is plainly a question of the interpretation of the agreement as a whole, and is a question which is reserved for the arbitrator.

The question of the correctness of the doctrine expressed by the Fifth Circuit in this case, and by the First Circuit in the cases cited, is at least as important as the question presented in cases like *American Manufacturing* and *New Bedford Defense Products*. In those cases, the First and Sixth Circuits disagree as to the role of a court where it is clear that management's rights are governed by a particular clause in the agreement and the question is one of interpreting and applying that clause to a particular grievance. In this area, on the other hand, the First, the Fifth and, presumably, the Sixth Circuits are in agreement, but the Tenth Circuit disagrees, as to whether the court or the arbitrator shall decide, not as to whether there is an arguable question, but, finally, whether any clause in the agreement applies to a grievance.

Whatever their relative importance, however, the two kinds of cases really involve the same basic issue: to what

extent should a federal court consider the merits of a grievance before ordering arbitration. In the view of the Tenth Circuit, and in our view, it is not for the courts to resolve, either finally or preliminarily, questions of "the proper interpretation or application of the contract" but to enforce the agreement of the parties that this is "a function which belongs to the arbitrator." But, whichever view is correct, the issue, in one form or the other, has been the subject of so much conflict, confusion and needless litigation in the lower courts that it should be settled by this Court.

CONCLUSION

For the reasons stated, it is respectfully submitted that this petition for certiorari should be granted.

ARTHUR J. GOLDBERG
DAVID E. FELLER
JERRY D. ANKER
1001 Connecticut Avenue, N. W.
Washington 6, D. C.
COOPER, MITCH, BLACK & CRAWFORD
1329 Brown-Marx Building
Birmingham, Alabama
Attorneys for Petitioner

APPENDIX A

In the

UNITED STATES DISTRICT COURT

For the Southern District of Alabama

UNITED STEELWORKERS OF AMERICA, AFL-CIO, AN UNINCORPORATED ASSOCIATION, *Plaintiff*, v. WARRIOR & GULF NAVIGATION COMPANY, A CORPORATION, *Defendant*.	Civil Action No. 2100

The above entitled cause came on to be heard upon motion for preliminary injunction under Section 301 of the Labor Management Relations Act of 1947, 61 Stat. 156, 29 U. S. C. 185, based upon plaintiff's complaint to compel defendants to arbitrate, under a labor contract, whether defendant has the right to contract out, or subcontract, maintenance work. The plaintiff's motion for preliminary injunction was set down for hearing on October 30, 1958, prior to which defendant filed in opposition to the motion for preliminary injunction, a motion to dismiss, and answer to the complaint. At the hearing on that day counsel for the parties stipulated that all pleadings and matters presented by them be consolidated, tried, and disposed of at one and the same time, and that testimony and other evidence be presented as if on final hearing for a permanent injunction as well as the preliminary injunction. The Court

on the same day, after hearing arguments by opposing counsel, and after duly considering same, reserved ruling on defendant's motion to dismiss the complaint and on the plaintiff's motion for preliminary injunction, and denied an oral motion by plaintiff to strike the Second, Third and Fourth defenses of the defendant's answer. Testimony and exhibits were presented by the parties, with opportunity for cross-examination, after which the matter was on the same day submitted to the Court. The Court, having duly considered the arguments, citations of legal authorities, pleadings and evidence of the parties submitted herein, and being fully advised in the premises and after due and full consideration, now makes the following:

FINDINGS OF FACT

1. The plaintiff, United Steelworkers of America, AFL-CIO, is an unincorporated labor organization within the meaning of Section 2 (paragraph 5) of the National Labor Relations Act, 61 Stat. 137, U. S. C. 152, and Section 301 of the Labor Management Relations Act of 1947, 61 Stat. 156, 29 U. S. C. 185. The plaintiff is engaged in representing employee members in collective bargaining with employers who are employed in the steel industry, including the defendant, Warrior & Gulf Navigation Company, a corporation having its principal place of business at Chickasaw, Alabama, within this District and engaged in transporting steel products through several Southern states as a contract carrier regulated by the Interstate Commerce Commission. The aforesaid activities of the plaintiff and the defendant affect commerce within the meaning of the statute above cited.

2. The plaintiff and the defendant are parties to a contract covering the maintenance employees, among others, at the Chickasaw terminal, dated September 25, 1956, and effective until midnight September 25, 1959, the pertinent portions of which read as follows:

SECTION 10
ADJUSTMENT OF GRIEVANCES

Issues which conflict with any Federal statute in its application as established by Court procedure or matters which are strictly a function of management shall not be subject to arbitration under this section.

Should differences arise between the Company and the Union or its members employed by the Company as to the meaning and application of the provisions of this Agreement, or should any local trouble of any kind arise, there shall be no suspension of work on account of such differences but an earnest effort shall be made to settle such differences immediately in the following manner:

A. For Maintenance Employees:

First, between the aggrieved employees, and the Foreman involved;

Second, between a member or members of the Grievance Committee designated by the Union, and the Foreman and Master Mechanic;

Third, between a member or members of the Grievance Committee and at the option of such committee a representative of the National Organization of the Union, and the Vice President;

Fourth, between the representatives of the National Organization of the Union and the representatives of the Company; and,

Fifth, if agreement has not been reached the matter shall be referred to an impartial umpire for decision. The parties shall meet to decide on an umpire acceptable to both. If no agreement on selection of an umpire is reached, the parties shall jointly petition the United States Conciliation Service for suggestion of a list of umpires from which selection will be made. The decision of the umpire shall be final. The expense and salary incident to the services of the umpire shall be paid jointly by the Company and the Union.

SECTION 11
MANAGEMENT

The management of the Company and the direction of the working forces, including the right to hire, suspend or discharge for proper cause, or transfer, and the right to relieve employees from duty because of lack of work, or for other legitimate reasons, is vested exclusively in the Company, provided that this will not be used for purposes of discrimination against any member of the Union.

3. On August 22, 1958, a number of employees signed a grievance which was presented to the defendant by the plaintiff and which read as follows:

We are hereby protesting the Co[illegible]any's actions, of arbitrarily and unreasonably contr[illegible]out work to other concerns, that could and prev[illegible] has been performed by Company employees.

This practice becomes unreasonable, unjust and discriminatory in lieu of the fact that at present there are a number of employees that have been laid off for about 1½ years or more for allegedly lack of work.

Confronted with these facts we charge that the Company is in violation of the contract by inducing a partial lock-out, of a number of the employees who would otherwise be working were it not for this unfair practice.

4. The plaintiff has not suggested that there is any provision in the labor contract which supports this grievance, and there is in fact no provision in said labor contract on which it may be grounded. Plaintiff contends that the language in Section 10 of the contract is broad enough to require that this dispute be submitted to arbitration; it asserts that the Court has the duty of determining whether there is any issue to be arbitrated.

5. The defendant was first organized in 1940, and, as an incident to its transportation business, maintains and operates a repair and maintenance yard at its main terminal at Chickasaw, Alabama.

6. The defendant has contracted out construction, repair and maintenance work practically since the inception of its business; it first signed a labor contract with the plaintiff several years prior to the present one.

7. The defendant has contracted out such repair maintenance and construction work solely for reasons of economy and efficiency.

8. Throughout the successive labor agreements between these parties, including the present one, the plaintiff has demonstrated that it was and has been aware of the defendant's practice of contracting out such work, and it has unsuccessfully sought to negotiate changes in the labor contracts, and particularly during the negotiation of the present labor agreement, in the year 1956, which would have limited the right of the defendant to continue the practice of contracting out such work.

9. None of the contracts between the parties affecting the employees involved here has ever contained any provision limiting or abridging in any manner the defendant's right to contract out work of any kind, nor has there been any complaint or grievance at any time prior to August 22, 1958, that any of the labor contracts between the parties in any way limited or abridged the right of the defendant to contract out maintenance or repair work.

10. The Court has read the labor contract carefully and is unable to find in it any provision which could be interpreted to mean that the defendant has surrendered its managerial right to contract out work, or whereby the defendant has agreed to confide in an arbitrator the right to review the defendant's business judgment in contracting out work.

11. On the other hand, the labor contract expressly recognizes the existence of, and reserves to the sole judgment of defendant, matters which are strictly a function of management; and the labor contract expressly prohibits arbitration of matters which are strictly a function of management. The Court finds that the contracting out of repair and main-

tenance work, as well as construction work, is strictly a function of management not limited in any respect by the labor agreement involved here.

12. The defendant has five different contracts with labor organizations, three of them with the plaintiff (one at Port Birmingham, Alabama, covering employees of the defendant there; the second, which is the one here involved, covering the employees at the terminal at Chickasaw, Alabama; and the third covering the deck hands and other unlicensed personnel aboard all of defendant's vessels); the other two labor contracts of defendant are with the Marine Engineers Beneficial Association covering the engineroom personnel aboard its vessels, and with the Master, Mates, and Pilots Union covering the wheelhouse employees aboard its vessels.

13. There has been no showing by the plaintiff that the defendant has engaged in or, insofar as these proceedings are concerned, could be adjudged to have engaged in any conduct which has violated any of the provisions of the present labor contract.

CONCLUSIONS OF LAW

Upon the foregoing findings of fact the Court concludes:

1. The Court has jurisdiction over the parties and the subject matter under Section 301 of the Labor Management Relations Act of 1947, 61 Stat. 156, 29 U. S. C. 185.

2. The parties are properly before the Court.

3. The issue presented is whether the defendant can be compelled to arbitrate the grievance protesting the contracting out of work.

4. The labor contract does not prohibit, and is not susceptible of being interpreted to require that defendant is prohibited from contracting out work.

5. The labor contract does not give the plaintiff or any of its members or any of the employees of the defendant the right to have arbitrated the question of whether the defendant may contract out work.

6. The right to contract out work is an inherent, traditional right of management which may not be questioned or subjected to arbitration in the absence of agreement on the part of the defendant or an express limitation thereof set forth in the labor contract.

7. The Court has considered the specific contention that Section 10 requires arbitration "should any local trouble of any kind arise," and finds from examination of the remainder of Section 10, of Section 11, of the contract as a whole, the evidence and the arguments of the parties, that this language cannot be interpreted to limit the right of the defendant to contract out work.

8. Defendant may not be required to arbitrate the grievance, and consequently defendant may not be restrained from refusing to arbitrate said grievance since plaintiff has no right to arbitration of the grievance under the labor contract.

ORDER

An order shall be and it is hereby entered denying the motion for a preliminary and permanent injunction and dismissing the complaint.

It Is, Therefore, Ordered by the Court that this cause be and the same hereby is, Dismissed, with costs taxed against plaintiff.

Made at Mobile, Alabama, this 22nd day of December, A.D., 1958.

DANIEL H. THOMAS,
United States District Judge.

U. S. District Court, Sou. Dist. Ala. Filed and entered this the 22nd day of December, 1958.

APPENDIX B

In the

UNITED STATES COURT OF APPEALS

For the Fifth Circuit

No. 17646

UNITED STEELWORKERS OF AMERICA, AFL-CIO,
Appellant,
v.
WARRIOR & GULF NAVIGATION COMPANY,
Appellee.

Appeal from the United States District Court for the Southern District of Alabama.

July 30, 1959

BEFORE: HUTCHESON, Chief Judge, and RIVES and TUTTLE, Circuit Judges.

TUTTLE, Circuit Judge: This is an appeal from a denial by the trial court of an order granting specific performance of an agreement to arbitrate. The action was brought by the appellant, United Steelworkers of America, AFL-CIO, against the appellee, Warrior & Gulf Navigation Company, under Section 301 of the Labor Management Relations Act, 29 U.S.C.A. § 185. The sole question presented by the suit is whether, under the terms of the collective bargaining agreement between the parties, unilateral action by the employer in contracting out work that had previously been per-

formed by members of the bargaining unit gave rise to a dispute which is subject to arbitration. The district court held that it did not, and, accordingly, dismissed the Union's complaint.

The employer is engaged in the transportation by barge of steel products and raw materials used in the manufacture of steel. It maintains a terminal at which it performs certain repair and maintenance work on its barges. During the term of the current collective bargaining agreement the company undertook to contract with others to perform some of this maintenance work. This resulted in the filing of a grievance by the union which averred as follows:

> "Nature of Grievance. We are hereby protesting the Company's actions, of arbitrarily and unreasonably contracting out work to other concerns, that could and previously has been performed by Company employees.
>
> "This practice becomes unreasonable, unjust and discriminatory in view of the fact that at present there are a number of employees that have been laid off for about 1½ years or more for allegedly lack of work.
>
> "Confronted with these facts we charge that the Company is in violation of the contract by inducing a partial lock-out, of a number of employees who would otherwise be working were it not for the unfair practice."

The Company took the position, which it adhered to in the suit below, that the matters dealt with in the grievance were not subject to grievance procedures. These grievance procedures are provided for by Section 10 of the collective bargaining agreement, the first paragraph of which follows:

> "Issues which conflict with any Federal statute in its application as established by Court procedure or matters which are strictly a function of management shall not be subject to arbitration under this section."

This language is immediately followed by a second introductory paragraph upon which the appellant places major reliance. It provides:

> "Should differences arise between the Company and the Union or its members employed by the Company as to the meaning and application of the provisions of this Agreement, or should any local trouble of any kind arise, there shall be no suspension of work on account of such differences, but an earnest effort shall be made to settle such differences immediately in the following manner: . . ."

In bringing its suit for specific performance of an agreement to arbitrate the appellant must, of course, show that the collective bargaining agreement places on appellee the duty to arbitrate. *Local No. 149* v. *General Electric Co.*, 1 Cir., 250 F. 2d 922, 927. The initial determination whether such duty arises under the contract must be made by the court. *Local No. 149* v. *General Electric Co., supra; Engineers Association* v. *Sperry Gyroscope Co.*, 2 Cir., 251 F. 2d 133, 137. Since an agreement relating to the processing of grievances, including compulsory arbitration, may appropriately be dealt with by the parties as they see fit, it is of course within the competence of the Union and the employer to limit the subject matter of such grievance procedures. Here the parties introduced the section dealing with grievances by an initial withdrawal from the provisions of the section of any matters "which are strictly a function of management." We have heretofore in *Amalgamated Association of Street, Electric Railway and Motor Coach Employees of America* v. *Greyhound Corporation*, 5 Cir., 231 F. 2d 585, stated that whatever subjects are not covered by an employment contract are left to the parties to act upon as they see fit. The contract before us does not deal with the power of the employer to contract with others to perform services previously done by its employees. Since this

is a matter as to which an employer may, except as limited by a specific collective bargaining agreement, do without violating either state or federal law, it remains, so far as relates to this agreement, strictly a matter of management. Even if this result did not follow from the fact that the contract does not restrict such action, it would nevertheless follow by reason of the construction of this collective bargaining agreement in the light of the conduct of the parties in negotiating it.

The trial court, upon ample evidence, made the following findings of fact:

> "8. Throughout the successive labor agreements between these parties, including the present one, the plaintiff has demonstrated that it was and has been aware of the defendant's practice of contracting out such work, and it has unsuccessfully sought to negotiate changes in the labor contracts, and particularly during the negotiation of the present labor agreement in the year 1956, which would have limited the right of the defendant to continue the practice of contracting out such work.
>
> "9. None of the contracts between the parties affecting the employees involved here has ever contained any provision limiting or abridging in any manner the defendant's right to contract out work of any kind, nor has there been any complaint or grievance at any time prior to August 22, 1958, that any of the labor contracts between the parties in any way limited or abridged the right of the defendant to contract out maintenance or repair work." 168 F. Supp. 702, 704-5 (1958).

Thus, what we have here is a collective bargaining agreement resulting from negotiations between the parties, one of which sought to include a provision prohibiting the company from contracting out some of its work. Having failed

at the conference table to obtain the consent of the other party to the inclusion of such provision, it signed the contract that was finally worked out, presumably by a process of "give and take" between the parties. It is not only consistent with basic principles governing the construction of a contract for the court, as it did, to hold that the final product should not be construed to give the Union the provision it had unsuccessfully sought to have incorporated, but it would be unconscionable for the court to hold to the contrary. Whatever may be meant ordinarily by the term "inherent rights of management," (Cf. *Amalgamated Association of Street, Electric Railway and Motor Coach Employees of America* v. *Greyhound Corporation, supra*) we clearly have here a matter which by the agreement of the parties, is "strictly a matter of management."

Having decided that the criticized action of the Company is action which by the agreement of the parties was not to be a subject of arbitration, we conclude that the trial court correctly decided that the action for specific performance must fail. *See Local No. 149* v. *General Electric Co.*, 1 Cir., 250 F. 2d 922; *United Steel Workers of America* v. *American Manufacturing Co.*, 6 Cir., 36 CCH, Lab. Cas. ¶ 65,300.

The appellant attempts, by characterizing the simple facts of contracting out maintenance work as "unreasonable, unjust and discriminatory," and by asserting such conduct by the Company amounts to "inducing a partial lockout," to set the complaint within a frame of reference comprehended by the agreement to arbitrate. This, however, cannot change the fact that the criticized action, by whatever name called, remains exempted from the range of arbitration. Moreover, it is plain that characterizing this action as "discriminatory" is not sufficient to bring it within the prohibition of the contract which forbids "discrimination against any member of the Union." This is so because there is no discrimination charged in the grievance except that the contracting out occurred at a time when there "are a number of employees

that have laid off for about 1½ years or more allegedly because of lack of work." Nor does the characterization of the Company's action as "a partial lockout" bring it within the language of the section making a "lockout on the part of the Company" a violation of the agreement. Any contention that such action as is here criticized amounts to what is known in labor-management relations as a "lockout" is clearly a simple play on words and is insubstantial.

The judgment is AFFIRMED.

RIVES, Circuit Judge, dissenting:

Originally of like view with my brothers and the learned district judge, further study and reflection have brought me to the certain conclusion that this judgment should be reversed.

The union's grievance as stated by a group of laboring men need not meet the technically precise requirements of strict pleadings. As quoted in the majority opinion, it clearly states: first, that the employer has engaged in the practice of subcontracting to such an extent that, under the conditions currently prevailing, the practice amounts to a partial lockout in violation of the express terms of the collective bargaining contract, and, secondly, that the employer has engaged in this practice for the purpose of discriminating against members of the union, again in violation of the express terms of the contract.[1]

In order to determine the arbitrability of this grievance, reference must be made to Section 10 of the contract, which provides, in pertinent part, as follows:

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[1] In its brief, the union also suggests that the grievance is premised upon the theory that the employer's actions are in violation of the purpose, recognition, wages, and seniority clauses of the contract. Such allegations do not, however, raise a different theory for these clauses are ultimately dependent for their content upon the discrimination and lockout clauses.

"ADJUSTMENT OF GRIEVANCES

"Issues which conflict with any Federal statute in its application as established by Court procedure or matters which are strictly a function of management shall not be subject to arbitration under this section.

"Should differences arise between the Company and the Union or its members employed by the Company as to the meaning and application of the provisions of this Agreement, or should any local trouble of any kind arise, there shall be no suspension of work on account of such differences, but an earnest effort shall be made to settle such differences immediately in the following manner: . . ."

Section 10 then proceeds to outline a five-step grievance procedure culminating in arbitration by an impartial umpire selected by the parties.

The decision in this case ultimately turns upon the interpretation given to the above-quoted provisions of Section 10. The employer, on the one hand, contends: that the first paragraph of Section 10 creates an overriding exclusion from the general arbitration provisions that follow; that this exclusion is for judicial cognizance rather than merely a direction of the arbitrator; and that the matter of subcontracting falls entirely within this exclusion in that it is "strictly a function of management." The union, on the other hand, joins issue on each of these points, contending: first, that no overriding exclusion from the general arbitration provisions is created; secondly, that, even if such an exclusion were created, the context renders it clear that the exclusion is no more than a direction to the arbitrator; and, finally, that, in any case, the matter of subcontracting without any restrictions is not "strictly a function of management," but, rather, is limited by other provisions of the agreement. I agree with the contention of the union on this third point, and hence do not reach the first two.[2]

[2] With respect to the questions raised concerning the first paragraph

Insofar as the union's grievance is premised upon the theory of a partial lockout, the controlling section of the agreement, in my view, is Section 3, which provides:

"ILLEGAL SUSPENSION OF WORK

"A strike or stoppage of work on the part of the employees represented by the parties signatory hereto shall be a violation of this Agreement, and there shall be no strikes, work stoppages, interruptions, or impeding of work. Likewise, a lockout on the part of the Company shall also be a violation of this Agreement."

The blanket prohibition of strikes and lockouts is nowhere qualified in the Agreement. On the contrary, the entire tenor of the Agreement is that the parties are seeking complete stability. By Section 3 the employer has unreservedly relinquished any managerial prerogative it might have had to resort to a lockout and, at the same time, it has subordinated any retained management functions to the overriding qualification that they not be exercised to effect a lockout. Any other construction would render nugatory the express provisions of Section 3.[3]

It therefore seems clear that, if the charges contained in the union's grievance of August 22 are true, the actions of the employer in subcontracting work are in violation of Section 3 of the contract. The essential question then is whether the contract contemplates the determination of these charges by arbitration. When attention is directed to the nature of the issues raised by the charges, it is clear that this question must be answered affirmatively.

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of Section 10, appellant's observation that "this can hardly be said to be a model of contractual draftsmanship" seems well taken.

[3] It cannot be said of the present arbitration clause as was said in Refinery Employees Union vs. Continental Oil Co., 5th Cir. No. 17344, decided June 24, 1959: "The arbitration clause in the case at bar is not a broad grant of authority to the arbitrators, a *quick pro quo* for giving up the right to strike."

In the first place, the contract provides for the arbitration of "differences . . . as to the meaning and application of the provisions of this Agreement." Clearly such differences are involved here. The dispute turns upon the meaning and application of the term "lock-out" as it appears in Section 3. Moreover, the contract provides for the arbitration of "any local trouble of any kind." A dispute as to the existence of a partial lockout would seem to be equally well covered by this provision.[4]

The decision of the district court below was premised upon acceptance of the employer's contention that subcontracting is "strictly a function of management" under the terms of the contract, and, therefore, disputes in reference thereto are expressly excluded from the scope of the arbitration provisions by the first paragraph of Section 10 of the Agreement.

Such a premise does not, however, withstand close examination. The management functions clause itself in the contract certainly does not sustain it. That clause provides only that

> "[t]he management of the Company and the direction of the working forces, including the right to hire, suspend or discharge for proper cause, or transfer, and the right to relieve employees from duty because of lack of work, or for other legitimate reasons, is vested exclusively in the Company, provided that this will not be used for purposes of discrimination against any member of the Union."

The employer has sought to avoid the implications of the absence of any express provision for the retention of the matter of subcontracting as a management function by reliance upon evidence which it contends establishes a practical construction of the contract to that effect, and which is

[4] See Timken Roller Bearing Co. v. N.L.R.B., 6th Cir. 1947, 161 F. 2d 949, wherein the Court of Appeals for the Sixth Circuit took a similar view of an identical arbitration provision.

summarized in the district court's findings of fact numbered 8 and 9, quoted in the majority opinion. Though those findings are amply supported by the evidence in the record, they are of no avail to the employer here. This is so because they fall entirely short of justifying the conclusion that unrestricted subcontracting in violation of other provisions of the collective bargaining agreement cannot give rise to an arbitrable grievance.

At the very most, these findings establish only that subcontracting is not, in itself, a violation of the contract and that the practice of subcontracting as it was engaged in by the employer during the earlier years of the relationship between the parties did not involve a breach of any other provisions of the contract. Quite obviously, these propositions do not dispose of the issues of this case. Since the allegation of a partial lockout is based upon *currently prevailing conditions,* the history of the relationship between the parties is in no way inconsistent with the union's present contention.[5] To borrow the words of a well-known labor arbitrator—"The . . . issue . . . is not whether the Company may contract out *all* of its work or *none* of its work. It is whether there was any implied contractual bar to the contracting out of *this particular . . . work . . . under the circumstances of this particular case.*"[6]

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[5] To hold otherwise would be to completely ignore the difference between a contract which limited or absolutely prohibited subcontracting and one which merely subordinated the employer's right to subcontract to the more general obligations imposed upon him by the collective bargaining contract, such as the obligation not to lockout and the obligation not to discriminate. The union's attempt to obtain a contract which would fall into the first of these categories certainly does not constitute an admission that the existing contract did not already fall into the second. Insofar as Finding of Fact No. 11 of the district court (168 F. Supp. 702, 705) is at variance with these views, it is incorrect.

[6] Ralph T. Seward, *Bethlehem Steel Co.*, 30 LA 678 (Emphasis in original.)

Insofar as the union's grievance is premised upon the theory that the employer has utilized the practice of subcontracting to discriminate against the members of the union, the case is even stronger. Section 11 of the contract *expressly* subordinates all management functions to the overriding limitation that they "not be used for purposes of discrimination against any members of the Union." Thus, "matters which are strictly a function of management," as that term is used in Section 10 of the contract, can never be interpreted to include disputes involving allegations of discrimination. To do so would involve ignoring express limitations in the management functions clause itself.[7]

In its Findings of Fact, the district court concluded that:

> "7. The defendant has contracted out such repair, maintenance and construction work solely for reasons of economy and efficiency.
>
> . . . . . .
>
> "13. There has been no showing by the plaintiff that the defendant has engaged in or, insofar as these proceedings are concerned, could be adjudged to have

[7] The interpretation given here to the term "strictly a function of management" cannot be objected to on the ground that it completely destroys the meaning of that clause. On the contrary, the clause is not without meaning, for it operates to preclude from arbitration any dispute as to the propriety of the exercise of a management function which does not involve a violation of other substantive provisions of the contract. For example, the employer need not arbitrate a dispute concerning his power to discharge for proper cause. If, on the other hand, the dispute involves an allegation that no proper cause for the discharge existed, or that the discharge was motivated by discriminatory purposes, the contract requires reference of the dispute to arbitration.

Similarly, the employer is under no obligation to arbitrate a dispute concerning his power to subcontract. But where, as here, the allegation is that this power has been utilized to violate other provisions of the contract, the duty to arbitrate arises.

Thus, the term "strictly a function of management" is interpreted to mean a function of management, the exercise of which does not involve a violation of any of the other provisions of the contract. Indeed, it is difficult to see how the word "strictly" could have any other meaning.

engaged in any conduct which has violated any of the provisions of the present labor contract." 168 F. Supp. 702, 704, 705.

Without expressing any opinion as to the correctness of these findings, they are without effect upon the course of this litigation. They involve a determination of the merits of the union's grievance, and, consequently, constitute an invasion of the province of the arbitrator as defined in the contract between the parties.[8]

I think that the judgment should be reversed, and therefore respectfully dissent.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Southern District of Alabama, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed;

It is further ordered and adjudged that the appellant,

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[8] We are not here confronted with the necessity of determining whether this Court will adopt the so-called *Cutler-Hammer* doctrine. See *International Association of Machinists* v. *Cutler-Hammer, Inc.*, 271 App. Div. 917, 67 N. Y. S. 2d 317 (Sup. Ct., 1947), aff'd without opinion, 297 N. Y. 519, 74 N. E. 2d 464 (1947). Under this doctrine, some courts have refused to order arbitration of a dispute otherwise clearly arbitrable on the ground that the plaintiff's grievance was so clearly without merit that no substantial question for arbitration was raised. See, *e.g.*, *United Steelworkers of America* v. *American Manufacturing Co.*, 43 LRRM 2757 (6th Cir. 1959). But see Judge Magruder's opinion in *New Bedford Defense Products Division* v. *Local 1113, U.A.W.*, 1st Cir. 1958, 258 F. 2d 522, 526-27. Without taking any view on the merits of this doctrine, I would hold that the grievance here sought to be arbitrated is not so lacking in substance as to fall within its ambit. The dispute is therefore arbitrable under the principles enunciated by this Court in *Lodge No. 12, etc.* v. *Cameron Iron Works*, 1958, 257 F. 2d 467, 471.

United Steelworkers of America, AFL-CIO, and the surety on the appeal bond herein, National Surety Corporation, be condemned, in solido, to pay the costs of this cause in this Court for which execution may be issued out of the said District Court.

"Rives, Circuit Judge, dissenting."